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Supreme Court, U.S.
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In The

Supreme Court of the United States

TIMOTHY R. BLOWERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a federal criminal case, where a key government witness has disclosed to the prosecutor that he is worried about coming into the state because of outstanding warrants for his arrest, supposedly in traffic cases, does this trigger a duty for the prosecutor pursuant to the Due Process Clause of the Fifth Amendment and *Brady v. Maryland* to investigate further and to disclose to the defense what he has been told so that the defense can investigate?

2. When a defendant alleges that he is the target of vindictive prosecution in violation of the Due Process Clause of the Fifth Amendment, and requests disclosure of the Government's files, is the requirement that he present "some evidence" that the motivation for the prosecution is improper met by circumstantial evidence of vindictiveness or is direct evidence required, and is the requirement that the defense show that similarly situated individuals were not prosecuted met in a complex real-estate trespass case by showing cases that are similar, but not exactly the same?

3. Where a trial court has previously ruled that the defense did not present enough evidence to require disclosure of the prosecution's files in a vindictive prosecution claim, does the Sixth Amendment nevertheless require that the defense be allowed to submit and argue to the jury the evidence it has to show bias and prejudice of the government's witness?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all the parties remaining in the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
ISSUE ONE	6
THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT A FEDERAL PROSECUTOR'S DUTY UNDER THE DUE PROCESS CLAUSE TO LEARN OF A GOVERNMENT WITNESS' PRIOR WRONGDOING IS TRIGGERED WHEN THE WITNESS HAS DISCLOSED TO THE PROSECUTOR INFORMATION THAT WOULD CAUSE A REASONABLE ATTORNEY TO BELIEVE THE WITNESS PROBABLY HAS A WORSE RECORD OF WRONGDOING THAN HE ADMITS	6
A. Operative Facts	6
B. Reasons why certiorari should be granted	9

TABLE OF CONTENTS – Continued

Page

ISSUE TWO 16

THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO DEMONSTRATE THAT CIRCUMSTANTIAL EVIDENCE OF VINDICTIVENESS IS SUFFICIENT TO OBTAIN DISCLOSURE ON A DUE PROCESS VINDICTIVE PROSECUTION CLAIM, AND ALSO PROVIDES THIS COURT A CHANCE TO ESTABLISH THAT ALTHOUGH THE DEFENSE MUST SHOW THAT SIMILARLY SITUATED INDIVIDUALS WERE NOT PROSECUTED, IN COMPLEX CASES THE SIMILARITY DOES NOT HAVE TO BE ABSOLUTE 16

A. Substantial evidence of improper motive was presented here 16

B. The evidence of similarly situated trespassers who were not prosecuted was sufficiently comparable, given the complexity of a real-estate trespass case 20

TABLE OF CONTENTS – Continued

Page

ISSUE THREE 23

THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT EVEN WHERE A TRIAL COURT HAS PREVIOUSLY RULED THAT THE DEFENSE DID NOT PRESENT ENOUGH EVIDENCE TO REQUIRE DISCLOSURE OF THE PROSECUTOR'S FILES IN A VINDICTIVE PROSECUTION CLAIM, THE FIFTH AND SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND A FAIR TRIAL NEVERTHELESS REQUIRE THAT THE DEFENSE BE ALLOWED TO SUBMIT AND ARGUE TO THE JURY THE EVIDENCE IT HAS TO SHOW BIAS AND PREJUDICE ON THE PART OF THE GOVERNMENT'S WITNESS 23

CONCLUSION 27

APPENDIX

Ninth Circuit Memorandum Decision Filed February 25, 2008 ..... App 1-6

Ninth Circuit Order Denying petition for Panel or en banc rehearing ..... App 7

TABLE OF AUTHORITIES

Page

CASE CITATIONS:

Brady v. Maryland, 373 U.S. 83 (1963) 6, 7, 9, 11, 14

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) 11, 12

Crane v. Kentucky, 476 U.S. 683 (1986) 26

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 25

Giglio v. United States, 405 U.S. 150 (1972) 7, 11

Kyles v. Whitley, 514 U.S. 419 (1995) 16

Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980) 14

Moran v. Burbine, 475 U.S. 412 (1986) 17

United States ex rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985) 14

United States v. Armstrong, 517 U.S. 456 (1996) 17, 19, 20

United States v. Auten, 632 F.2d 478 (5th Cir. 1980) 14

United States v. Bell, 367 F.3d 452 (5th Cir. 2004) 24

United States v. Bindley, 157 F.3d 1235 (10th Cir. 1998) 25

United States v. Blowers, 268 Fed. App. 504, 2008 WL 510405 (9th Cir. 2008) 1

United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Dees, 34 F.3d 838 (9th Cir. 1994) 24

United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973) 14

United States v. Henry, 749 F.2d 203 (5th Cir. 1984) 14

United States v. Kisling, 334 F.3d 734 (8th Cir. 2003) 11

United States v. Laboy-Delgado, 84 F.3d 22 (1st Cir. 1996) 24

United States v. Larson, 460 F.3d 1200 (9th Cir. 2006) 26

United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991) 14

United States v. Quartermaine, 913 F.2d 910 (11th Cir. 1990) 11

United States v. Saunders, 166 F.3d 907 (7th Cir. 1999) 24

United States v. Schoneberg, 388 F.3d 1275 (9th Cir. 2004) 24

United States v. Urqhart, 469 F.3d 745 (8th Cir. 2006) 24

United States v. Young, 20 F.3d 758 (7th Cir. 1994) 14

TABLE OF AUTHORITIES – Continued

Page

RULE CITATIONS:

18 U.S.C. § 3231 1

18 U.S.C. § 3742(a) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1254(1) 1

Fed. R. Evid. 104(e) 26

Fed. R. Evid. 403 24

U.S. Sup. Ct. Rule 13(3) 1

STATUTORY CITATIONS:

Ariz. Rev. Stat. § 13-2506 10

CONSTITUTIONAL CITATIONS:

U.S. Const. amend. V 2, 16, 23, 27

U.S. Const. amend. VI 2, 27

OPINION BELOW

The Court of Appeals for the Ninth Circuit issued a memorandum decision in this case on February 25, 2008. *See United States v. Blowers*, 268 Fed. App. 504, 2008 WL 510405 (9th Cir. 2008). The decision is reprinted in the Appendix to this Petition at App. 1-6. On June 6, 2008 the Court of Appeals denied defendant's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*. That order is reprinted in the Appendix at App. 7.

STATEMENT OF JURISDICTION

Because the Court of Appeals for the Ninth Circuit denied relief in the direct appeal of this federal criminal case as set forth above, Title 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari that decision. The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) from the entry of final judgment and sentence in the district court. The United States District Court for the District of Arizona had subject matter jurisdiction of this case under 18 U.S.C. § 3231 because Defendant Timothy Blowers was charged with federal crimes. This petition is timely under U.S. Sup. Ct. Rule 13(3) because the appeals court's denial of rehearing was entered on June 6, 2008.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves violations of the Fifth and Sixth Amendments. The Fifth Amendment to the United States Constitution provides in relevant part that no person shall be "deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

This is a case about the re-grading of some old dirt roads out in the Arizona desert which, as explained below, damaged perhaps $500 worth of desert plants situated on $3,400 worth of U.S. government land, but which an employee of the Bureau of Land Management ("BLM"), for reasons discussed below, claimed to have caused $2 million worth of damage. Evidence later showed that 93% of the roadways in

question had been created decades before the events of this case, and had been re-graded many times in the past. The roads are located near Sahaurita, Arizona, south of Tucson in an old mining area sometimes called the "Indian Kitchen" area, because the Indian Kitchen archaeological site is nearby.

The BLM employee, Ms. Susan Bernal, was assigned to assess the damage from some unauthorized road grading done in 1997 and 1998. A few years earlier the Forest Service had closed a firearms range near Tucson, and the Government needed to replace it. Plans were underway for a new shooting range to be constructed on BLM land at the Indian Kitchen site. Bernal, then a new employee, was put in charge of the transition for the BLM. Petitioner Tim Blowers and co-defendant Lane Holmes organized landowners in the area to oppose the proposed gun range, urging that the Indian Kitchen archaeological site be turned into a county park instead of a shooting range. Eventually the gun range plan was scrapped. Based on these facts the defense argued that Ms. Bernal held a grudge against the defendants based on protected First Amendment activities, and that she therefore exaggerated the damages in retaliation.

Ms. Bernal was a relatively new BLM employee who had never investigated this kind of case before. She had no experience in scientifically counting desert plants. Ms. Bernal had, however, been in the escrow business for decades, and presumably knew something about the real estate market. All of the road segments that she claimed were newly-cut

through virgin desert amounted, by the Government's own evidence, to less than one acre of land. Post-trial evidence showed that land in that area was valued for tax purposes at $750 per acre. In a confusing series of hearings prior to, during and after trial, it became apparent that Bernal was claiming that there were hundreds of thousands of dollars worth of damage to plants on this one acre of land, even though the land itself, with all of the plants on it would have sold for only a tiny fraction of that.

Nevertheless, based on Ms. Bernal's investigation, Petitioner Tim Blowers and co-defendant Lane Holmes were charged with 37 criminal counts, 19 of which were felonies, including one count of Conspiracy and nine groupings of Depredation of Government Property, Injury to Trees, Trespass, and Excavation of Archaeological Resources. The defense moved for dismissal on the grounds of vindictive prosecution, alleging that the case resulted from a grudge Ms. Bernal harbored against these defendants. The defense moved for disclosure relating to that claim. After several evidentiary hearings the magistrate judge recommended denial of the request, and the district court adopted that recommendation.

The case subsequently proceeded to a jury trial, which lasted more than three weeks. A crucial Government witness who supported Ms. Bernal's allegations that hundreds of plants had been destroyed was a man named Mark Anderson. His ability to perceive and recall was therefore important to the Government's case. After the events, but before trial, he

moved from Arizona to Colorado, but returned to Arizona during the trial to testify.

Before trial, however, unbeknownst to the defense, Anderson had told the prosecutor that he was worried about returning to Arizona because there were traffic-related warrants outstanding for his arrest. The defense had never even been told that Anderson had any evidence to give, or was to be a witness until the eve of trial, when his grand jury testimony was disclosed amongst a thick stack of other transcripts.

Had the Government disclosed to the defense what Anderson told the prosecutor about fearing arrest warrants, the defense would have learned that the warrants were actually for misdemeanor criminal charges, not for traffic charges. Moreover, the defense would have also discovered that Anderson, who exhibited the demeanor of a "boy scout" during his trial testimony was a chronic crack-cocaine user, who had used crack for years before, during and after the relevant time period. The defense would also have learned that Anderson had been charged with theft, which is one of the charges for which he had an outstanding arrest warrant. They would also have learned that he had serious behavioral-health issues which had resulted in various suicide attempts, including a three-hour standoff with police during which Anderson held a gun to his own head. The defense would have also found a witness to whom Anderson had, during a crack cocaine binge, confessed to a murder. This information would have given the defense impeachment material with which

to call into question Anderson's ability to perceive and recount events. In addition, the defense could have impeached Anderson with his outright lie to the prosecutor in this very case that the warrants were for traffic offenses. The defense was unaware of any of this, however, until after trial.

At the conclusion of trial the District court dismissed 12 of the charges due to insufficient evidence, and the jury acquitted Mr. Blowers on six of the remaining counts, but convicted him on 16 other counts, six of which were felonies and ten of which were misdemeanors. A direct appeal to the Ninth Circuit followed, resulting in the attached decision affirming all of the convictions.

III. DISCUSSION

ISSUE ONE

THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT A FEDERAL PROSECUTOR'S DUTY UNDER THE DUE PROCESS CLAUSE TO LEARN OF A GOVERNMENT WITNESS' PRIOR WRONGDOING IS TRIGGERED WHEN THE WITNESS HAS DISCLOSED TO THE PROSECUTOR INFORMATION THAT WOULD CAUSE A REASONABLE ATTORNEY TO BELIEVE THE WITNESS PROBABLY HAS A WORSE RECORD OF WRONGDOING THAN HE ADMITS.

A. Operative Facts

Early in the case the defense filed a notice of motions, including motions under *Brady v. Maryland*,

373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Before trial defense counsel moved for disclosure of the grand jury transcripts on the grounds that they would contain exculpatory information disclosable under *Brady*. The Government insisted on its right to keep the grand jury transcripts "secret" until just before trial, and the trial court agreed, denying the defense access to the transcripts.

At about 4:30 on the Friday afternoon before the trial was to start on Monday morning, the Government disclosed to the defense for the first time excerpts of the grand jury testimony of some 42 individuals whom the Government might call as trial witnesses. That disclosure was approximately 500 pages long and came with another stack of documents approximately an inch thick.

Twenty-four of those individuals had not previously been disclosed as witnesses, among whom was Mr. Mark Anderson. Before that disclosure Anderson's name had never been mentioned during three years of pre-trial litigation. What the Government concealed from the defense is that almost a month before trial Anderson, then in Colorado, had stated to the prosecutor that he was apprehensive about coming back to Arizona to testify because, as the prosecutor later put it, Anderson had "some outstanding/ unpaid traffic tickets and there may be pending warrants."

Early in the trial the Government presented Anderson's testimony. Anderson was, as the defense

later put it, the "Swiss Army Knife Witness" – whatever item the Government needed to fix its case, Anderson's testimony seemed to have it. Anderson presented extremely well in trial, coming across as "Mr. Clean" or a "Boy Scout" with no ax to grind. Anderson testified to many facts helpful to the Government.

After trial, shocked at Anderson's false testimony, the defense began to investigate his background. This is difficult for defense attorneys to do because, unlike the Government, which has virtually instant access to computerized criminal information databases, the defense must hire investigators who use less-comprehensive databases and who must contact individual courts, police agencies, and other entities to look for a person's law enforcement contacts.

Nevertheless, within a few weeks after trial the defense had uncovered three police reports connecting Anderson to criminal activities. One showed that on May 13, 1998 Anderson had been arrested for "Disorderly Conduct/Domestic Violence," and was convicted of that charge. A second set of reports indicated that on February 15, 2000 Anderson was arrested in Tucson trying to purchase crack cocaine, was in possession of a glass pipe, had initially lied to the police about what he was doing in the area and, at the time of trial herein, was subject to an outstanding arrest warrant for that offense. A third report indicated that Anderson had defrauded a woman in the retirement community of Green Valley, and an arrest warrant was outstanding for that charge as well. The

defense then conducted further investigation that revealed that Mr. Anderson had numerous other police contacts involving crack cocaine and suicide threats. The defense filed a motion for new trial based in part on the Government's failure to disclose Anderson's criminal background, but that motion was denied.

B. Reasons why certiorari should be granted

The instant case presents an opportunity for this Court to address an important issue: the limits of a prosecutor's duty under the Due Process clause of the Fifth Amendment to seek out information relating to the credibility of a Government witness when the prosecutor has learned that impeachment information against that witness may be available. A prosecutor's duty to disclose exculpatory information is one of the most important safeguards in the criminal justice system, and the limits of that obligation remain murky to this day. It is extremely important that prosecutors understand that they may not remain willfully ignorant of the existence of *Brady* material once circumstances alert them to the likelihood of its existence. It is simply unconscionable for an Assistant United States Attorney, having been told that his witness is worried about outstanding warrants for his arrest, to fail to check the person's criminal history, to fail to disclose to the defense what was said, and indeed to withhold from the defense the person's very existence as a possible witness until the eve of trial

when it is too late for the defense to conduct its own background check before trial.

The Ninth Circuit decision on this issue is, in large measure, based on the proposition that the defense "does not seriously argue that [Mr. Anderson's] telephone call, standing alone, would have been relevant impeachment material." (App. 2.) This contention is belied by the record. The defense most definitely did argue, both in writing, and at oral argument, that the Government should have, at a minimum, told the defense that Anderson knew there were warrants out for his arrest and that he was evading them.

Evading arrest constitutes an unlawful act, in and of itself – in Arizona the crime of Failure to Appear in the Second Degree. *See* Ariz. Rev. Stat. § 13-2506. This unlawful behavior, continuing at the very time of the testimony, clearly reflects on the witness' honesty and would have been relevant impeachment material. An honest person would not hide out in another state to prevent warrants from being served. While it is true that the defense argument below concentrated more on the veritable mountain of remaining impeachment material that would have been uncovered if proper disclosure had been made (relating to crack cocaine, theft and repeated suicide threats), it is by no means correct to say that the defense ever conceded that a Government witness' knowing evasion of arrest at the time of his testimony is not, in and of itself, a matter that a jury is entitled to know about.

Day in and day out in the district courts we see defendants held in prison pending trial, at least in part because they had previously failed to appear in previous minor matters. Those decisions are routinely affirmed on appeal. *See, e.g.*, *United States v. Kisling*, 334 F.3d 734, 735 (8th Cir. 2003) (defendant detained in part due to failure to appear for domestic assault charge); *United States v. Quartermaine*, 913 F.2d 910, 916 (11th Cir. 1990) (detention based partially on failure to appear at proceedings in unrelated misdemeanor and domestic cases). Clearly, evading arrest does reflect on a person's honesty and trustworthiness. Yet in the present case the Ninth Circuit somehow concludes that a prosecutor can simply ignore that one of his key witnesses is evading arrest at the very time of his testimony.

Moreover, according to this Ninth Circuit decision, a prosecutor's knowledge of such facts creates no duty for the prosecutor to run a background check on this person, even though the defense filed a notice of motions under *Brady*, and *Giglio* at the outset of the case. The Ninth Circuit's holding completely neglects an extensive body of case law holding that under certain circumstances a prosecutor is required to find prior bad acts of a witness that are not already known to the Government.

One such case is the Ninth Circuit's own decision in *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), which explicitly held that the failure of a prosecutor to discover that the prison file of his witness

contained indications he was a liar, violated the State's constitutional obligations:

> Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned.

Carriger, 132 F.3d at 480.

The same is true here as well. It is difficult to understand why the prosecutor in *Carriger* was obliged to investigate the Arizona Department of Corrections' file on its witness to see if it said anything about him being a liar, but this prosecutor, who ***knew*** that this crucial witness was evading arrest warrants, had no obligation to verify the witness' self-serving statements minimizing the nature of his warrants. This is especially indefensible because a prosecutor can do such verification virtually at the push of a button with the National Crime Information Center ("NCIC") system. In contrast, the defense has no access to NCIC, and so must hire an investigator to obtain information piecemeal. Thus, by hiding Anderson's testimony from the defense (even though the defense requested this information long before trial) and then disclosing it mixed in among many other witnesses, some of whom testified and some of whom did not, the Government made it virtually impossible for the defense to find the needle-in-the-haystack impeachment evidence that it should have been given in the first place.

The prosecutor here had enough information to raise the concern in the mind of a reasonable attorney that Anderson had more of a criminal record than he stated. One factor is that, according to the prosecutor, Anderson said the warrants were for traffic matters. This alone should have raised a red flag because in Arizona traffic matters are civil and do not generate arrest warrants.

Similarly, according to the prosecutor, Anderson told him that he had hired a lawyer to take care of the matters. Any experienced attorney, however, (which this prosecutor was) would know that it would almost surely be more expensive to hire a lawyer than to just mail in payment for the tickets, if they were merely traffic matters.

Thus, the presence of arrest warrants outstanding at the time of the witness' testimony, in conjunction with these other circumstances, raised a giant red flag for this prosecutor. There can be no doubt that if the situation were reversed, and the prosecutor had learned these same facts about a defense witness, that the prosecutor would have had an NCIC check run on that witness well before trial. This Court should hold that a prosecutor cannot simply exploit his strategic advantages and turn a blind eye to the background of his own witness when such troubling signs are made known to him.

The Ninth Circuit's decision also ignores the many cases from other circuits holding that prosecutors ***do***, under certain circumstances, have an

obligation to find information about prior bad acts of a government witness, even though the information is not known to the prosecutor. *See United States v. Perdomo*, 929 F.2d 967 (3rd Cir. 1991) (reversing conviction on *Brady* grounds where prosecutor found no prior criminal records for witness in national database, but failed to check local records); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (reversing conviction where government witness admitted one prior conviction during trial testimony, but evidence later showed that he had two others which Government failed to learn of because it did not run records check on him); *United States v. Young*, 20 F.3d 758 (7th Cir. 1994) (Government's failure to obtain records was not *Brady* violation simply because the prosecutor had diligently searched for such records and disclosed all information found); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (prosecution had duty to furnish "rap sheet" of decedent to the defense even where document was in possession of medical examiner, not prosecutor); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) (requiring prosecution to obtain witness' personnel file from cooperating Government agency) *overruled on other grounds United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States ex rel. Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985) (Government had duty to find and disclose exculpatory ballistic report that was unknown to prosecutor); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992) (prosecutor's *Brady* obligation extended to police department's homicide and internal affairs files where witness was a police

officer). While the facts of those cases are not identical, they cannot be distinguished on a principled basis from the facts of this case, where the prosecutor was on notice of continuing unlawful behavior by his own witness.

Instead, the Ninth Circuit turned a blind eye to all of these cases saying only that the "mere mention of unpaid traffic tickets did not call for further investigation." (Dec. at 3.) This is a grossly unfair characterization. It was not merely the fact that there were unpaid tickets, but the facts that this witness was ***wanted by the police for offenses serious enough to justify the issuance of arrest warrants*** (which civil traffic tickets do not generate), *knew* there were warrants and was purposefully evading them at the time he was to testify, and that he claimed to have hired an attorney, which would likely have been more expensive than merely paying traffic tickets. Only willful blindness could prevent a prosecutor from investigating the matter further.

The Ninth Circuit's decision in this case has essentially ratified the act of a federal prosecutor hiding from the defense that his key witness was evading arrest for crimes at the very time of his testimony, and had the effect of hiding that this apparent "boy scout" of a witness was in fact a crack cocaine user who has exhibited serious mental health issues, and was wanted for theft. It is simply inconceivable that a federal court would countenance hiding such lawless behavior from the defense. This prosecutor simply decided to "tack too close to the

wind," as warned against in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). In so doing, he violated the Due Process clause of the Fifth Amendment. Accordingly, this Court should grant certiorari to demonstrate that under circumstances such as these a prosecutor has an obligation to obtain and disclose impeachment information regarding an important Government witness.

ISSUE TWO

THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO DEMONSTRATE THAT CIRCUMSTANTIAL EVIDENCE OF VINDICTIVENESS IS SUFFICIENT TO OBTAIN DISCLOSURE ON A DUE PROCESS VINDICTIVE PROSECUTION CLAIM, AND ALSO PROVIDES THIS COURT A CHANCE TO ESTABLISH THAT ALTHOUGH THE DEFENSE MUST SHOW THAT SIMILARLY SITUATED INDIVIDUALS WERE NOT PROSECUTED, IN COMPLEX CASES THE SIMILARITY DOES NOT HAVE TO BE ABSOLUTE.

A. Substantial evidence of improper motive was presented here.

One of the key defense contentions herein was that this prosecution was the product of a grudge held by BLM employee Susan Bernal against Defendant Tim Blowers and his co-defendant Lane Holmes for their efforts to block the gun-range project that Bernal had previously spearheaded for the BLM. As part of that claim, the defense sought disclosure of

the prosecution's files. If vindictive prosecution were proven it would be a violation of the Due Process Clause of the Fifth Amendment. *Moran v. Burbine*, 475 U.S. 412, 466 (1986).

The District Court denied the request on the grounds that the defense did not produce a substantive witness indicating that Bernal acted for vindictive reasons. The Ninth Circuit ratified that error, holding that the defense failed to make the required showing of discriminatory motive, quoting the trial court as saying that after presenting an "enormous amount of testimony" the defense failed to "produce one substantive ***source*** indicating that Bernal acted as alleged." (Dec. at 4, emphasis added.)

It is true that the defense produced no eyewitness to Ms. Bernal explicitly confessing her malevolent motivations. That, however, is not what the law requires. This Court has explicitly held that, in order for the prosecution to be required to disclose evidence regarding a vindictive prosecution claim the defense must first produce only "some evidence" tending to show the existence of the essential elements of the defense, which are discriminatory effect and discriminatory intent. *United States v. Armstrong*, 517 U.S. 456, 468 (1996).

The defense presented a great deal of circumstantial evidence on both points. Regarding discriminatory intent, the defense presented evidence of both motive and improper actions indicating maliciousness. The defense showed that Bernal was a new

BLM employee who had been placed in charge of the gun-range project for the BLM. The defense presented indications that this was a politically important issue. The defense showed that these defendants were part of a group that derailed that project, and that Bernal knew it.

The defense further proved that Bernal's estimates of plant destruction were completely false, inflated to more than $2 million from what could have been no more than $400,000 (the amount the Government itself claimed during trial only a few months after the vindictive prosecution hearings, reduced ***as a result of the defense cross examination at those hearings***) or $50,000 (the amount upon which the sentence was ultimately based) or $500, the amount testified to at the hearings by a Ph.D. biologist, and subsequently demonstrated to be accurate in post-trial hearings. Indeed, the real estate from which the plants were purportedly removed ***including all the plants themselves***, was worth, in fee simple, only $3,400.00 according to a post-trial certified appraisal which has never been disputed. Bernal, as a real-estate specialist, must have realized this. Thus, the million dollar figures she cooked up are, *per se*, "some evidence" of a discriminatory motive by a governmental official acting far outside of her supposedly neutral role.

The same is true for the numbers of plants that Bernal claimed to have personally counted. She based her damage estimates on the loss of hundreds of trees, yet her own video, ***taken months earlier***

than her "count," showed virtually ***no plants missing or destroyed***. The fact that there was almost no plant damage along these roads was confirmed by Carol Hahn, who lived nearby. It was confirmed by before-and-after aerial photograph analysis, as well as by the man who drove the grader on the longest road. It was further confirmed by the testimony of the Ph.D. biologist referred to above, who explained in detail why Bernal's methodology for estimating the number of plants lost was completely wrong, why he did not believe even 1/10 of the amount of damage she claimed actually took place, and why the total plant damage was probably no more than $500.

In short the defense presented evidence that Bernal had a motive to be vindictive, and also that she vastly exaggerated what was at most minor damage, an action consistent with vindictiveness. This was far more than just "some evidence" that Bernal was not acting as a neutral government employee, but instead was acting as a person nursing a grudge would act. The Ninth Circuit decision's resort to merely quoting the trial court's finding, which is patently belied by the record in this case, does not amount to the independent review, and constitutes a blatant circumvention of this Court's holding in *Armstrong*.

B. The evidence of similarly situated trespassers who were not prosecuted was sufficiently comparable, given the complexity of a real-estate trespass case.

This case also provides this Court with an opportunity to correct another critical misconception regarding vindictive prosecution claims: what constitutes a "similarly situated" defendant? This refers to the other prong of the test for vindictive prosecution claims, which is that the defendant must show that there have been other similarly situated people who were not prosecuted. *Armstrong*, 517 U.S. at 466. The *Armstrong* case involved drug prosecutions, which tend to lend themselves to direct comparison with each other far more easily than real-estate based cases. Unlike ordinary fungible drug cases, which can be easily compared based on quantity of drugs involved, no two complex real-estate trespass cases will ever be the same. Common sense and reason would therefore demand that some leeway as to similarity be applied.

The Ninth Circuit's decision claims that all of the other cases that the defense presented as "comparables" had facts materially different from those in the case at hand. Well, of course they did. What the defense did show, however, was that there were other cases not resulting in felony prosecutions in which there was damage ***as bad as, or even worse***, than in this case. The best example is the Camper Ranch Club of America case, first disclosed by the BLM after trial, in response to a Freedom of Information Act

request that the defense had made before trial. That case involved BLM land located near the Indian Kitchen area, and where the damages were even worse than in the present case.

The Camper Ranches company bladed roads on BLM land very near the Indian Kitchen area, as well as constructing such things as an RV dump station, electric hookups, fences, corrals, and retaining walls. These activities created a disturbance of approximately 4 acres on BLM land, which is more than the total of 3.7 acres that was ultimately shown in the instant case, and far more than the 9/10 of an acre that the Government alleged were "new" roads in this case. The Camper Ranches company clearly knew that these facilities were on BLM land, as evidenced by a map posted in their office that explicitly said so.

Instead of criminal prosecution the BLM, represented by the same employee – Real Estate Specialist Susan Bernal – seems to have merely asked the company to pay back rent for the land, and had been patiently negotiating with them for years. Camper Ranches was also offered the opportunity to buy the land, an offer the Government made in every one of the trespass cases that the defense discovered after trial in the Federal Register. Moreover, the BLM disclosure demonstrated that the BLM had manipulated the amount of damage herein, because in the Camper Ranches case it valued mesquite trees and palo verde trees at only $50 each, as compared to the $900 for each palo verde tree and $200 for each

mesquite tree that it claimed here. The defense proffered abundant evidence of all of this to the District Court as soon as it was learned from the BLM, and moved to re-open the issue, but the trial court simply ignored this evidence, as did the Ninth Circuit's decision.

The defense also presented two other comparable cases. One is the Carpenter Ranch case, involving a trespass road on BLM land approximately one mile (5,280 feet) long, and destruction of archaeological resources, in addition to even more disturbance to Arizona State land. The BLM estimated the Carpenter Ranch damage to be $41,842, which is within the same ballpark as the District Court's ultimate damage findings in this case ($51,000). The Carpenter case resulted in a settlement with only $2,437 restitution going to the BLM. In contrast, these defendants were prosecuted on dozens of counts, many of which were felonies.

The other comparable case involves the ASARCO mining firm. ASARCO built a pipeline, an electrical line, and a road each 1,500 feet long across BLM land, along with a tailings dump. These created more than 4,500 feet of new disturbance, covering about 2½ acres, more than twice the acreage of "new" roads in the instant case. ASARCO eventually reported its own trespass to the BLM, but only after the land had been declared a national monument, making detection almost inevitable. Vegetation damage was estimated at $25,000. The ASARCO matter was not prosecuted criminally.

Unlike drug cases, real-estate trespass cases can, by their very nature, never be exactly the same because real estate inevitably involves factors that are many orders of magnitude more complex than drug cases. This Court should grant certiorari to establish that in such cases the Due Process Clause of the Fifth Amendment does not require the defense to find other cases that are exactly the same, but that similar cases, such as the "comparables" offered herein are sufficient to meet the "similarly situated" prong of the test for disclosure.

ISSUE THREE

THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT EVEN WHERE A TRIAL COURT HAS PREVIOUSLY RULED THAT THE DEFENSE DID NOT PRESENT ENOUGH EVIDENCE TO REQUIRE DISCLOSURE OF THE PROSECUTOR'S FILES IN A VINDICTIVE PROSECUTION CLAIM, THE FIFTH AND SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND A FAIR TRIAL NEVERTHELESS REQUIRE THAT THE DEFENSE BE ALLOWED TO SUBMIT AND ARGUE TO THE JURY THE EVIDENCE IT HAS TO SHOW BIAS AND PREJUDICE ON THE PART OF THE GOVERNMENT'S WITNESS.

After the trial court denied the defense motion for disclosure, the Government moved to preclude the defense from introducing evidence of vindictive prosecution, and to preclude all evidence concerning

the proposed gun range. The defense argued that the precluded evidence was vital to show the bias and prejudice of Government witness Susan Bernal, which was necessary to explain to the jury why Ms. Bernal, whom one would expect to have been a neutral government employee, would have exaggerated the evidence regarding plant damage from $500 to hundreds of thousands of dollars. The trial court nevertheless precluded all such evidence, stating that the issues had been thoroughly litigated, the evidence would not support such an argument of bias, and it was therefore inadmissible under Fed. R. Evid. 403. The defense argued in the trial court and on appeal that the trial court's preclusion of all evidence of Ms. Bernal's bias stemming from the gun range violated the defendant's Fifth and Sixth Amendment rights to confrontation and a fair trial.

As with the previous issue, the Ninth Circuit decision on this issue is again based solely on its previous erroneous finding that the defense had failed to present "any evidence" regarding selective prosecution. This finding is belied by the record, as set forth above.[1]

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[1] In addition the Ninth Circuit applied the wrong standard of review. Questions of whether limitations on cross-examination are so severe as to amount to a violation of the Confrontation Clause are reviewed *de novo*. *See, e.g.*, *United States v. Laboy-Delgado*, 84 F.3d 22, 28 (1st Cir. 1996); *United States v. Bell*, 367 F.3d 452, 465 (5th Cir. 2004); *United States v. Saunders*, 166 F.3d 907, 918 (7th Cir. 1999); *United States v. Urqhart*, 469 F.3d 745, 748 (8th Cir. 2006); *United States v. Dees*, 34 F.3d 838, 843

(Continued on following page)

Moreover, both the trial court and the Ninth Circuit ignored the fact that ***the defense does not have to make out all the elements of a vindictive prosecution claim in order to be allowed to impeach a witness for her bias and prejudice***. The two are logically separate and distinct questions. In order to assess Bernal's motivations in testifying it was vital for the jury to know that she was personally responsible for managing BLM's role in the gun range, that this was an important political issue, and that these defendants were part of a group that thwarted that plan. It was not the province of the District Court, the Ninth Circuit, or even this Court, to determine whether Ms. Bernal's situation gave her a motive to dissemble or exaggerate – it was up to the jury, and only the jury to make that assessment. Mr. Blowers' confrontation and fair trial rights were clearly violated by the trial court's explicit preclusion of all evidence (and therefore argument) tending to show Bernal was biased due to the events involving the gun range.

It is well established in this Court's jurisprudence that, although a Court may limit cross examination regarding bias and prejudice, it cannot bar such evidence entirely. *Delaware v. Van Arsdall*, 475

(9th Cir. 1994); *United States v. Bindley*, 157 F.3d 1235, 1240 (10th Cir. 1998). Nevertheless, the Ninth Circuit reviewed this case only for abuse of discretion, even though the Confrontation Clause violation was fully briefed and argued. (Dec. at 4.) This, in and of itself, was error requiring reversal.

U.S. 673, 679-80 (1986). The defense must be allowed to delve into "whether [the witness] was biased" and also "to make a record from which to argue why [the witness] might have been biased." *United States v. Schoneberg*, 388 F.3d 1275, 1279 (9th Cir. 2004); *See also United States v. Larson*, 460 F.3d 1200, 1206 (9th Cir. 2006) (trial court cannot foreclose all inquiry into otherwise proper area of cross-examination). This is exactly what the court prohibited in this case.

Although it may seem contradictory at first blush to allow a jury to hear such evidence after the trial court has already ruled that it was insufficient to entitle the defense to disclosure regarding its vindictive prosecution claim, the two are in fact perfectly consistent. The situation here is directly analogous to the well-established rule that even if a trial judge finds that a defendant's statement is voluntary, the defense must still be permitted to present evidence of involuntariness to the jury because questions of credibility, whether of a witness or of a confession, are for the jury, not the judge, to decide. *Crane v. Kentucky*, 476 U.S. 683, 688 (1986).

This is just as true for evidence of bias and prejudice as it is for voluntariness. Indeed this principle is explicitly enshrined in the evidentiary rules, which provide that although courts must make preliminary factual decisions regarding admissibility, those decisions may not "limit the right of a party to introduce before the jury evidence relevant to weight or credibility." Fed. R. Evid. 104(e). This Court relied on that very Rule in the *Crane* case. *Crane*, 476 U.S.

at 689. The application of this Rule herein is indisputable; yet it was never analyzed by the Ninth Circuit or the District Court.

What happened here is simply that the District Court decided that it did not believe the defendants' evidence showing that Bernal was biased, and therefore the jury should not be allowed to decide for itself by hearing evidence or argument on the subject. The preclusion of such evidence and all direct argument of vindictiveness that would have flowed from it, flagrantly violated Mr. Blowers' right to Confrontation. Accordingly, this Court should grant certiorari to establish that pursuant to the Fifth and Sixth Amendment rights to confrontation and a fair trial such evidence must be allowed to go to the jury even where the trial court has previously decided that the evidence is not enough to trigger disclosure regarding a vindictive prosecutions motion.

CONCLUSION

For the foregoing reasons this Court should grant this petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 4th day of September, 2008.

WILLIAM J. KIRCHNER*
Counsel of Record for Petitioner
Timothy Ray Blowers

*Mr. Kirchner is a member of the Bar of this Court.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY R. BLOWERS, Defendant-Appellant.	No. 06-10337 D.C. No. CR-00-00161-JMR MEMORANDUM* (Filed Feb. 25, 2008)

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted January 15, 2008
San Francisco, California

Before: WALLACE and SCHRODER, Circuit Judges, and BENITEZ**, District Judge.

Blowers appeals from his conviction of conspiracy (18 U.S.C. § 371), depredation of United States property (18 U.S.C. § 1361), injury to trees (18 U.S.C. § 1853), destruction of an archaeological resource (16

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Roger T. Benitez, United States District Judge for the Southern District of California, sitting by designation.

U.S.C. § 470ee), and trespass (43 C.F.R. § 2920.1-2). We have jurisdiction pursuant to 18 U.S.C. § 3231, and we affirm.

Blowers first argues that the government violated *Brady v. Maryland,* 373 U.S. 83 (1963), when it failed to turn over evidence relating to the criminal history of one of its witnesses, Mark Anderson. We review the district court's denial of Blowers' motion for a new trial on this ground *de novo. See United States v. Ogles,* 406 F.3d 586, 591 (9th Cir. 2005).

To prevail on his *Brady* claim, Blowers was required to show that the evidence relating to Mark Anderson (1) was "exculpatory or impeaching," (2) "should have been, but was not produced," and (3) "was material to his guilt or punishment." *Id.* Blowers' claim fails at the first step of this analysis. At the time of trial, the *only* evidence in the government's possession relating to Anderson's criminal history was a single telephone call in which he expressed apprehension about returning to Arizona "because he had some outstanding/unpaid traffic tickets and there may be some pending warrants." The prosecutor correctly concluded that this information was neither exculpatory nor impeaching. In fact, Blowers does not seriously argue that this telephone call, standing alone, would have been relevant impeachment material. Instead, he rests his argument on the evidence of Anderson's criminal history and drug use that he was able to discover through independent investigation after the trial. None of this subsequently discovered information is relevant to

our *Brady* analysis, however, because the government did not *possess* the information at the time of trial. *See Sanchez v. United States,* 50 F.3d 1448, 1453 (9th Cir. 1995) ("The government has no obligation to produce information which it does not possess or of which it is unaware"). Furthermore, the prosecution did not violate *Brady* by failing to investigate Anderson's background. The government had numerous interactions with Anderson before the telephone call, none of which revealed any hint of his prior criminal activity or drug use. Against this backdrop, his mere mention of unpaid traffic tickets did not call for further investigation.

Blowers next argues that the district court erred in denying his motion to dismiss and his request for discovery on the issue of selective prosecution. We review the district court's denial for abuse of discretion. *See United States v. Arenas-Ortiz,* 339 F.3d 1066, 1069 (9th Cir. 2003).

To make out a successful claim of selective prosecution, Blowers was required to show that (1) "federal prosecutorial policy had a discriminatory effect" and (2) "it was motivated by a discriminatory purpose." *United States v. Armstrong,* 517 U.S. 456, 465 (1996) (internal quotation marks and citation omitted). To prevail on a request for discovery on the issue of selective prosecution, Blowers was required to produce "some evidence tending to show the existence of the essential elements of the defense." *Id.* at 468 (internal quotation marks and citation omitted). Blowers has not met this burden. His only argument

with respect to discriminatory motive is that a Bureau of Land Management employee, Susan Bernal, orchestrated his prosecution in retaliation for his public opposition to a gun range. As the district court held, however, even after presenting "an enormous amount of testimony" to the magistrate judge, Blowers was not able to "produce one substantive source indicating that Bernal acted as Defendants allege." Furthermore, Blowers failed to provide any evidence of discriminatory effect, as all of the cases he cited involved facts materially different from those at hand.

Blowers also argues that he should have been allowed to cross-examine Bernal on his theory of selective prosecution at trial. We review the district court's decision to limit the scope of cross-examination for abuse of discretion. *United States v. Dees,* 34 F.3d 838, 843 (9th Cir. 1994). Under Rule 403, the district court is free to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Given Blowers' failure, during extensive pretrial hearings, to provide *any* evidence of selective prosecution, the district court did not abuse its discretion in concluding that it would be needlessly time-consuming and confusing to allow Blowers to pursue the issue further on cross-examination.

Next, Blowers argues that the district court erred when it denied his motion for acquittal on grounds of insufficient proof. We review the district court's decision *de novo*. *United States v. Garcia*, 497 F.3d 964, 966-67 (9th Cir. 2007). The government presented evidence of hundreds of thousands of dollars of damage to government property. It tied this damage to the specific dates and locations in the indictment using (1) an invoice for grading equipment, (2) a flier advertising a party at Indian Kitchen Rock, and (3) testimony from various eyewitnesses. Viewing this evidence in a light most favorable to the prosecution, we conclude that "the jury reasonably could have found the defendant guilty beyond a reasonable doubt" on the 16 counts for which he was convicted. *Id.* at 967 (internal quotation marks and citation omitted).

Finally, Blowers argues that the district court erred when it instructed the jury on the depredation counts. Blowers did not object to the jury instruction at trial, so this court reviews for plain error. *See United States v. Tirouda*, 394 F.3d 683, 688 (9th Cir. 2005). The indictment charged Blowers with "depredation against property of the United States, that is public lands, as well as the trees, plants, including cactus, and archeological resources." Blowers argues that because this language is phrased in the conjunctive, the government was required to present evidence that he damaged archeological resources, and therefore he should have been entitled to a jury instruction regarding his knowledge of archeological

value. The law is well-settled, however, that the government may charge a defendant in the conjunctive, and convict on any one of the conjunctively-charged acts. *See Griffin v. United States,* 502 U.S. 46, 50 (1991). Accordingly, the district court did not err, plainly or otherwise, when it instructed the jury on depredation.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY R. BLOWERS, Defendant-Appellant.	No. 06-10337 D.C. No. CR-00-00161-JMR District of Arizona, Tucson ORDER (Filed Jun. 6, 2008)

Before: WALLACE and SCHRODER, Circuit Judges, and BENITEZ*, District Judge.

The Petition for Panel Rehearing is DENIED.

Judge Schroeder has voted to deny the Petition for Rehearing En Banc, and Judge Wallace and Judge Benitez so recommend.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing En Banc is DENIED.

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* The Honorable Roger T. Benitez, United States District Judge for the Southern District of California, sitting by designation.